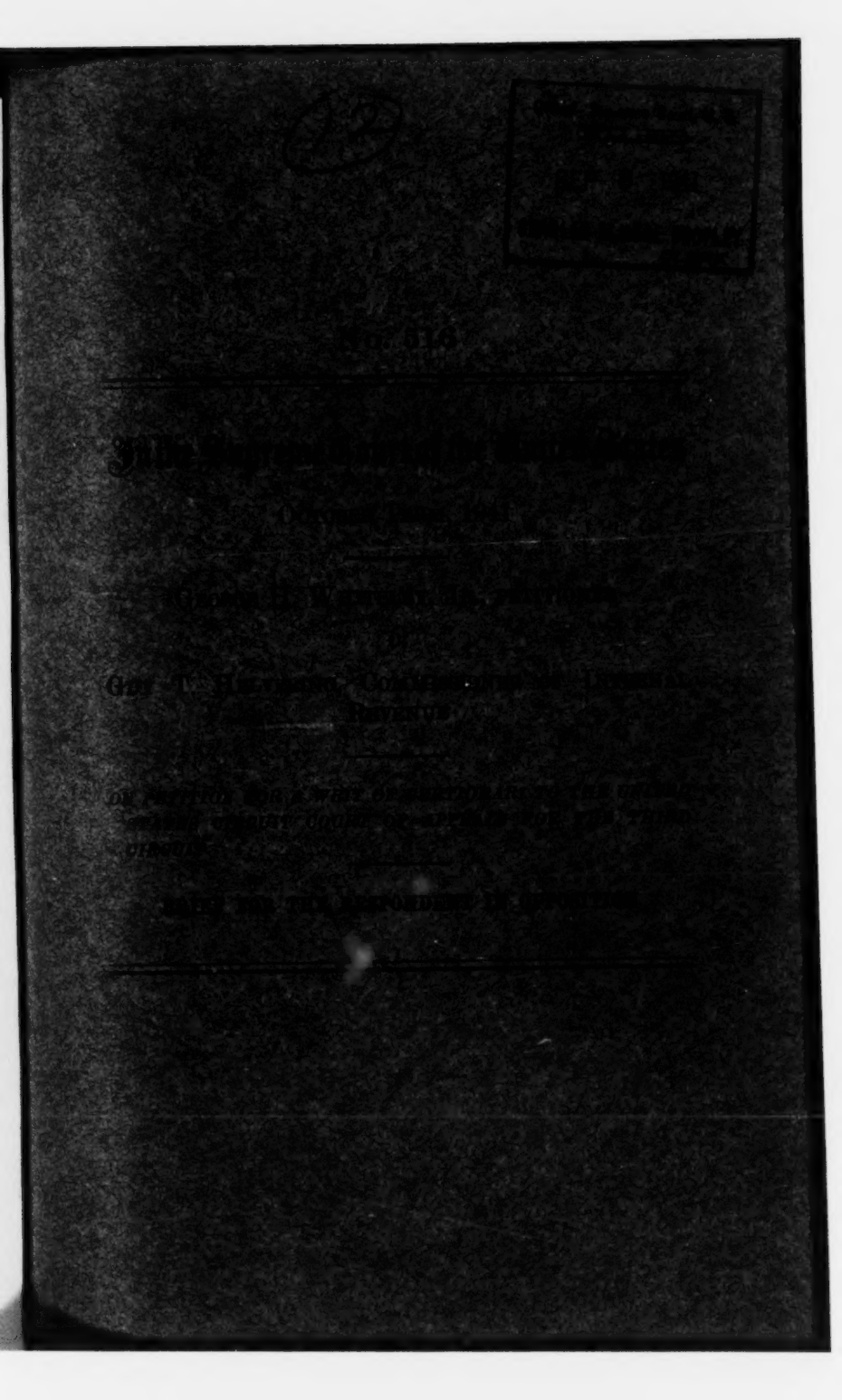

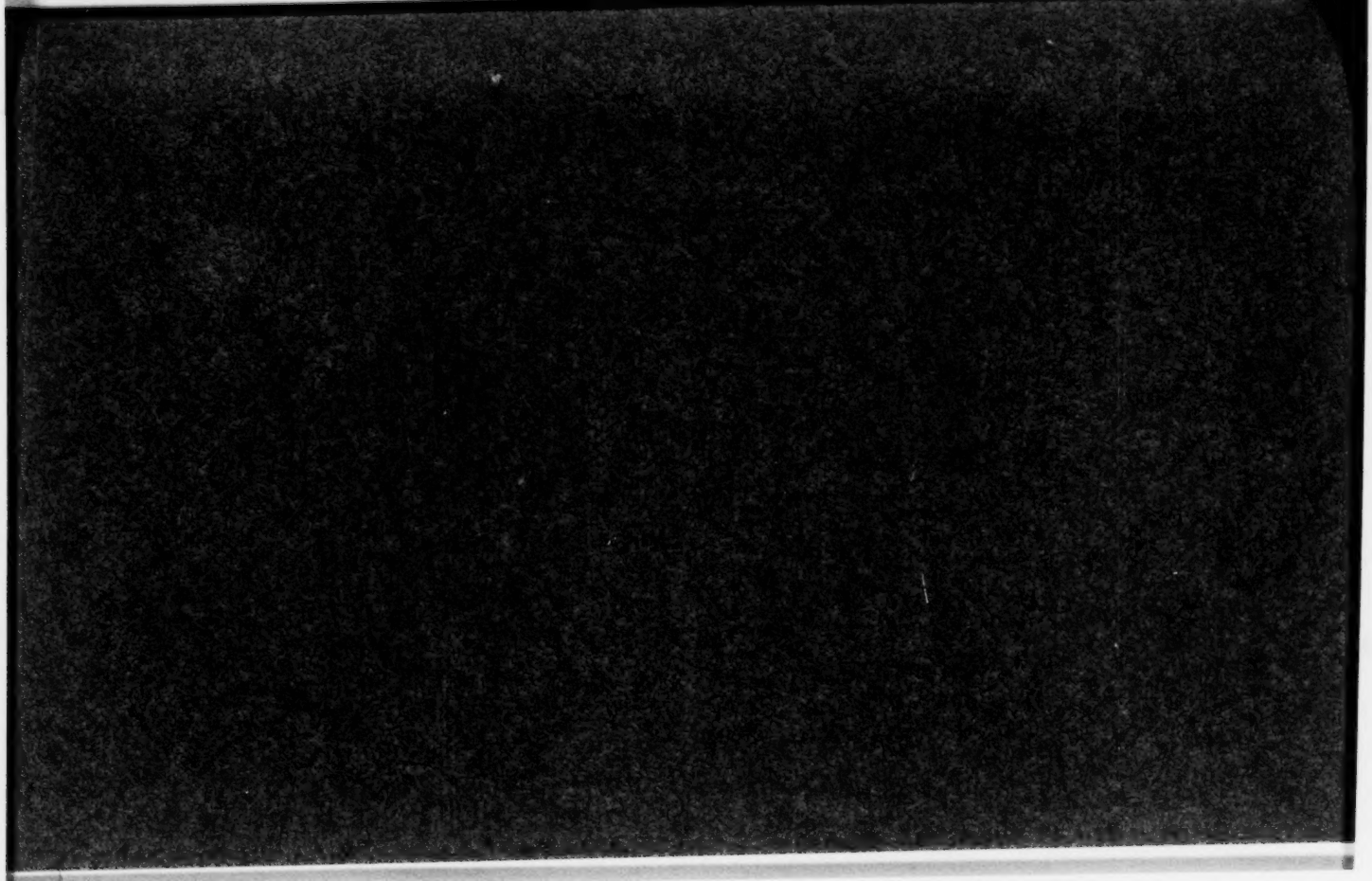

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411598—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 516

GEORGE H. WHITELEY, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion and dissenting opinion in the Board of Tax Appeals (R. 67–84) are reported in 42 B. T. A. 402. The opinion of the Circuit Court of Appeals (R. 86–92) is reported in 120 F. (2d) 782.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 29, 1941 (R. 92). The petition for writ of certiorari was filed August 16, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer created trusts for the benefit of his children, all of whom were minors during the taxable year, reserving the right to order the trustee to pay the income to himself to be used for their support. During taxpayer's life, investments of trust funds were to be made only with his approval; he also reserved the right to vote all shares of stock held in trust. Upon attaining majority, each child was to get the undistributed income and any of the corpus in such amounts and at such times as ordered by the taxpayer. Was the taxpayer accountable under Sections 22 (a) or 167 of the Revenue Act of 1934 for the 1935 income of the trusts which was invested for the benefit of the children?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 8–12.

STATEMENT

The Board of Tax Appeals found the following facts:

On June 12, 1935, the taxpayer created an irrevocable trust for each one of his four children, naming the First National Bank of York, Pennsyl-

vania, trustee. The terms of the trusts were identical. The one created for the benefit of his minor daughter, Virginia, provided for the payment of the income of the trust "to the Donor, as, if and when ordered in writing by him to do so, during the minority of his daughter, Virginia Whiteley, to be used solely and entirely by him for her support, maintenance, education, and enjoyment." Any income not distributed was to be invested in securities "if ordered and approved by the Donor." After the beneficiary attained the age of 21, she was entitled to receive income and corpus "in such amounts and at such times as the Donor in writing orders such distribution or distributions to be made" (R. 72–73).

During 1935 the income of the four trusts was $5,878, all of which, except $450, was invested and became a part of the corpus of the trust. The $450 was paid to the taxpayer and was invested by him for the children in 40 shares of preferred stock of the Empire Power Company. Ten shares of the stock were issued to and registered in the name of each child (R. 73).

The Commissioner ruled that the entire item of $5,878 received by the four trusts must be included in the taxpayer's gross income. The Board of Tax Appeals sustained the Commissioner and the court below affirmed the decision of the Board.

ARGUMENT

This case does not present a conflict, and it was correctly decided in accordance with principles approved by this Court.

1. The grantor retained the power to distribute the income for the support of his minor children, or to direct its accumulation for their benefit to be paid to them at such time and in such manner as he might determine. He reserved also substantial control over the corpus. It seems quite plain that such an attempt to deflect income to members of the family group while at the same time retaining control over its source can not relieve the taxpayer of liability. *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579; *Helvering* v. *Clifford,* 309 U. S. 331; *Hormel* v. *Helvering,* 312 U. S. 552; *Helvering* v. *Fuller,* 310 U. S. 69, 76.

2. Although the foregoing result was reached by the court below upon the basis of Section 22 (a) of the Revenue Act of 1934, the decision is also supportable under Section 167 (a) (2), as was held by the Board of Tax Appeals. For, under *Helvering* v. *Schweitzer,* 296 U. S. 551 and related cases,[1] trust income devoted to the maintenance of the grantor's minor children is treated as though it were paid directly to the grantor. Therefore, since the grantor could have required the income

[1] *Helvering* v. *Stokes,* 296 U. S. 551; *Helvering* v. *Coxey,* 297 U. S. 694; cf. *Douglas* v. *Willcuts,* 296 U. S. 1, 9.

to be so distributed, Section 167 (a) (2) is applicable.

3. The taxpayer's reference (Br. 12–13) to an unofficial ruling (G. C. M. 18972, 1937–2 Cum. Bull. 231, 233) in support of his position must be considered in the light of the Treasury Regulations themselves which, as originally adopted,[2] and as amended (Appendix, *infra*), are in accord with our interpretation of the statute.

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[2] Treasury Regulations 86, promulgated under the Revenue Act of 1934:

"ART. 167–1. *Trusts in the income of which the grantor retains an interest.*— * * *

"(*b*) *Test of taxability to the grantor.*—The test of the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether the grantor has failed to divest himself, permanently and definitively, of every right which might, by any possibility, enable him to have the income, at some time, distributed to him, actually or constructively. Such a distribution to the grantor occurs if the income is paid to him or to another according to the grantor's direction or if, though paid to another pursuant to the terms of the trust, the benefit of the income inures to the grantor. The income so inures if it is or may be applied in satisfaction of a legal obligation of the grantor. * * *

* * * * *

"If the grantor has retained any such interest in the income, such income is taxable to the grantor regardless of—

* * * * *

"(4) whether, if such distribution results in the inuring of benefits to the grantor from the application of the income in satisfaction of his legal obligation, such obligation is to pay a debt, to support dependents, to pay alimony, to furnish maintenance, and support or otherwise:"

4. *Higgins* v. *White,* 93 F. (2d) 357 (C. C. A. 1st), does not, as asserted by petitioner (Pet. 4), present a conflict between the circuits. Not only does it involve a materially different factual situation, but the decision itself is now of doubtful authority in the First Circuit. Upon a second appeal in that case, judgment was entered for the Government upon a different theory, and the court expressed considerable doubt as to its prior ruling indicating that it would not then be reexamined only because it had become the law of the case. *White* v. *Higgins,* 116 F. (2d) 312 (C. C. A. 1st).

CONCLUSION

The decision below is correct. There is no conflict with any decision of any Circuit Court of Appeals. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1941.